

<b>TO: Mail Stop 8</b> <b>Director of the U.S. Patent &amp; Trademark Office</b> <b>P.O. Box 1450</b> <b>Alexandria, VA 22313-1450</b>	<b>REPORT ON THE</b> <b>FILING OR DETERMINATION OF AN</b> <b>ACTION REGARDING A PATENT OR</b> <b>TRADEMARK</b>
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In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Northern District of California on the following ☒ Patents or ☐ Trademarks:

DOCKET NO. CV 11-04100 PSG	DATE FILED 8/19/2011	U.S. DISTRICT COURT 280 South First Street, Rm 2112, San Jose, CA 95113
PLAINTIFF TESSENDERLO KERLEY INC		DEFENDANT OR-CAL INC
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 6,110,867		SEE ATTACHED COMPLAINT
2 6,464,995		
3		
4		
5		

In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY	<input type="checkbox"/> Amendment	<input type="checkbox"/> Answer	<input type="checkbox"/> Cross Bill	<input type="checkbox"/> Other Pleading
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK			
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK Richard W. Wicking	(BY) DEPUTY CLERK Betty Walton	DATE August 23, 2011
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Copy 1—Upon initiation of action, mail this copy to Commissioner Copy 3—Upon termination of action, mail this copy to Commissioner  
Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner Copy 4—Case file copy

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21 **UNITED STATES DISTRICT COURT FOR THE**  
22 **NORTHERN DISTRICT OF CALIFORNIA**

PSG

23 **TESSENDERLO KERLEY, INC., a**  
24 Delaware corporation,

25 Plaintiff,

26 v.

27 **OR-CAL, Inc., an Oregon corporation,**  
Defendant.

**CV 11 4100**

Case No.

**COMPLAINT FOR  
PATENT INFRINGEMENT**

**DEMAND FOR JURY TRIAL**

1 Plaintiff Tesserderlo Kerley, Inc. ("TKI"), by and through its undersigned attorneys, files  
2 this Complaint against defendant OR-CAL, Inc. ("OR-CAL"). In support of its claims, TKI  
3 states as follows:

#### 4 PARTIES

5 1. TKI is a Delaware corporation having its principal place of business at 2255  
6 North 44th Street, Phoenix, Arizona 85008.

7 2. Upon information and belief, defendant OR-CAL is an Oregon corporation,  
8 having a principal place of business at 29454 Meadowview Road, Junction City, Oregon  
9 97448.

10 3. Defendant OR-CAL manufactures and distributes crop protectants throughout  
11 the United States, including in the state of California, in direct competition with TKI.

#### 12 JURISDICTION AND VENUE

13 4. This is an action for patent infringement arising under the Patent Act.

14 5. This Court has subject matter jurisdiction over this action under 28 U.S.C. §  
15 1338(a), which confers jurisdiction over cases of patent infringement, and under 28 U.S.C. §  
16 1331, which confers federal question jurisdiction in general.

17 6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

#### 18 INTRADISTRICT ASSIGNMENT

19 7. This is an Intellectual Property Action to be assigned on a district-wide basis  
20 pursuant to Civil Local Rule 3-2(c).

#### 21 NATURE OF THE ACTION

22 8. This action is brought under the Patent Act, 35 U.S.C. § 271 *et seq.*

23 9. TKI seeks injunctive and compensatory damages for OR-CAL's willful  
24 infringement of TKI's United States Patent Nos. 6,110,867 ("the '867 patent") and 6,464,995  
25 ("the '995 patent").

26 10. TKI and OR-CAL are direct competitors in the market for the manufacture and  
27 sale of crop protectants.

28 11. OR-CAL's patent infringement has resulted in substantial harm to TKI in the

1 form of lost sales and lost profits. Injunctive relief from this Court is necessary to prevent  
2 further harm to TKI.

### 3 BACKGROUND

#### 4 TKI's Patents

5 12. The '867 patent, entitled "Method for Providing Enhanced Photosynthesis,"  
6 issued on August 29, 2000 in the name of inventors David Michael Glenn, Dennis G.  
7 Sekutowski, and Gary J. Puterka. TKI enjoys all exclusive rights and privileges with respect  
8 to the '867 patent in the United States, including the right to enforce the '867 patent in its  
9 own name. A copy of the '867 patent is attached hereto as Exhibit 1.

10 13. The '867 patent was the subject of reexamination proceedings, Application  
11 Serial No. 90/006,658, before the United States Patent and Trademark Office ("USPTO"). A  
12 reexamination certificate was issued by the USPTO on March 7, 2006.

13 14. The subject matter of the '867 patent relates to a method for enhancing  
14 photosynthesis of a horticultural crop by increasing carbon dioxide assimilation of said  
15 horticultural crop which comprises applying to the surface of said horticultural crop an  
16 effective amount of one or more highly reflective particulate materials, said particulate  
17 materials being finely divided, and wherein the particles as applied allow for the exchange of  
18 gases on the surface of said crop and the finely divided particulate materials have a median  
19 individual particle size below about 3 microns.

20 15. The '995 patent, entitled "Treated Horticultural Substrates," issued on October  
21 15, 2002 in the name of inventors Dennis G. Sekutowski, and Gary J. Puterka, and David  
22 Michael Glenn. TKI enjoys all exclusive rights and privileges with respect to the '995 patent  
23 in the United States, including the right to enforce the '995 patent in its own name. A copy  
24 of the '995 patent is attached hereto as Exhibit 2.

25 16. The subject matter of the '995 patent relates to a method for enhancing the  
26 horticultural effect of horticultural substrates selected from the group consisting of fruits,  
27 vegetables, trees, flowers, grasses, roots, and landscape and ornamental plants which  
28 comprises applying a slurry comprising water, a surfactant, and one or more particulate

1 materials, selected from the group consisting of calcium carbonate, hydrous kaolin, calcined  
2 kaolin and mixtures thereof, to the surface of said substrate to form a membrane comprised  
3 of one or more particulate layers and the surfactant, said layers comprising one or more  
4 particulate materials, said particulate materials being finely divided, and wherein said  
5 membrane allows for the exchange of gases on the surface of said substrate.

#### 6 Crop Protectant Products

7 17. TKI manufactures and sells a kaolin-based crop protectant product under the  
8 brand name Surround<sup>®</sup>, for use as a broad spectrum agricultural crop protectant for  
9 controlling damage from various physiological disorders such as sunburn and heat stress as  
10 well as a growth enhancer. Exhibit 3 (Surround label). TKI has the right to exclude from the  
11 marketplace any competing product for which its application infringes at least claim 1 of the  
12 '867 patent and/or claim 23 of the '995 patent.

13 18. On information and belief, OR-CAL has manufactured, offered for sale, and/or  
14 sold calcium carbonate sun protectant products for crops, including products ultimately  
15 distributed as Mask<sup>®</sup> and/or Diffusion<sup>®</sup>.

16 19. The Mask and/or Diffusion sunburn protectant products have been and/or are  
17 distributed by Wilbur-Ellis Company, which has its Corporate and Agribusiness offices in  
18 this judicial district, respectively at 345 California Street, San Francisco, California 94104  
19 and 1801 Oakland Boulevard, Walnut Creek, California 94596. See Exhibit 4 (Mask label)  
20 and Exhibit 5 (Diffusion label). On information and belief, the Mask and/or Diffusion  
21 products have been and/or are manufactured and packaged by defendant OR-CAL and sold  
22 to Wilbur-Ellis Company which in-turn offers for sale, sells, and has sold these products to  
23 others.

#### 24 OR-CAL's Infringement of TKI's Patents

25 20. Upon information and belief, application of OR-CAL's calcium carbonate  
26 products, such as the Mask and/or Diffusion products, infringes at least claim 1 of the '867  
27 patent and claim 23 of the '995 patent. Promotional materials for the Mask and Diffusion  
28 products describes them as: (1) a flowable micronized dispersion of calcium carbonate; (2)

recommended as a protectant against, and used in minimizing, sunburn and heat stress; (3) optimizing and allowing for greater photosynthesis; and/or (4) providing a healthy crop and the best yields. See, e.g., Exhibits 4, 5, and 6 (brochure entitled "Diffusion. The Science of Light Management.").

#### COUNT I

##### Infringement of U.S. Patent No. 6,110,867

21. Paragraphs 1 through 20 of the complaint are incorporated by reference as though fully set forth herein.

22. All claims of the '867 patent are presumed valid and enforceable.

23. On information and belief, defendant OR-CAL has contributorily infringed and/or actively induced the infringement under 35 U.S.C. § 271, and continues to contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at least claim 1 of the '867 patent by (1) making, having made, selling, and/or offering for sale, (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing others to use calcium carbonate products such as the Mask and/or Diffusion products.

24. Defendant OR-CAL's infringement is committed with knowledge of the '867 patent and is intentional, willful and deliberate.

25. As a result of defendant OR-CAL's infringement of the '867 patent, TKI has been damaged and will be further damaged, and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

26. As a result of defendant OR-CAL's infringement of the '867 patent, TKI has suffered and will continue to suffer irreparable harm, for which TKI has no adequate remedy at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. § 283.

#### COUNT II

##### Infringement of U.S. Patent No. 6,464,995

27. Paragraphs 1 through 26 of the complaint are incorporated by reference as though fully set forth herein.

28. All claims of the '995 patent are presumed valid and enforceable.

29. On information and belief, defendant OR-CAL has contributorily infringed and/or actively induced the infringement under 35 U.S.C. § 271, and continues to contributorily infringe and/or actively induce the infringement under 35 U.S.C. § 271, of at least claim 23 of the '995 patent by (1) making, having made, selling, and/or offering for sale, (2) authorizing others to make, have made, sell, and/or offer for sale, and/or (3) causing others to use calcium carbonate products such as the Mask and/or Diffusion products.

30. Defendant OR-CAL's infringement is committed with knowledge of the '995 patent and is intentional, willful and deliberate.

31. As a result of defendant OR-CAL's infringement of the '995 patent, TKI has been damaged and will be further damaged, and is entitled to be compensated for such damages, pursuant to 35 U.S.C. § 284, in an amount to be determined at trial.

32. As a result of defendant OR-CAL's infringement of the '995 patent, TKI has suffered and will continue to suffer irreparable harm, for which TKI has no adequate remedy at law, unless the Court enjoins such infringing activities pursuant to 35 U.S.C. § 283.

### REQUEST FOR RELIEF

WHEREFORE, TKI respectfully requests that this Court enter a Judgment and Order in its favor and against defendant OR-CAL as follows:

(a) A judgment that defendant OR-CAL has contributed to and/or actively induced the infringement of the '867 patent by (i) making, having made, selling, and/or offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others to use calcium carbonate products such as the Mask and/or Diffusion products in the United States:

(b) A judgment that defendant OR-CAL has contributed to and/or actively induced the infringement of the '995 patent by (i) making, having made, selling, and/or offering for sale, (ii) authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others to use calcium carbonate products such as the Mask and/or Diffusion products in the United States:

(c) A judgment and order permanently enjoining defendant OR-CAL from further

1 infringing the '867 patent by (i) making, having made, selling, and/or offering for sale, (ii)  
2 authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others  
3 to use calcium carbonate products such as the Mask and/or Diffusion products in the United  
4 States;

5 (d) A judgment and order permanently enjoining defendant OR-CAL from further  
6 infringing the '995 patent by (i) making, having made, selling, and/or offering for sale, (ii)  
7 authorizing others to make, have made, sell, and/or offer for sale, and/or (iii) causing others  
8 to use calcium carbonate products such as the Mask and/or Diffusion products in the United  
9 States;

10 (e) A judgment and order requiring defendant OR-CAL to pay all available and  
11 legally permissible damages to compensate TKI for defendant's infringing acts, but in no  
12 event less than a reasonable royalty in accordance with 35 U.S.C. § 284;

13 (f) A finding that defendant's conduct is willful, warranting an award of treble  
14 damages under 35 U.S.C. § 284;

15 (g) A finding that this case is exceptional under 35 U.S.C. § 285, warranting an  
16 award to TKI of its costs, including attorney fees, and other expenses incurred in connection  
17 with this action;

18 (h) A judgment and order requiring that defendant OR-CAL pay TKI pre-  
19 judgment interest and post-judgment interest on all damages awarded;

20 (i) Such further relief as this Court deems just and appropriate.  
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## JURY DEMAND